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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1604

CENTRAL MACHINERY COMPANY, APPELLANT

v.

STATE OF ARIZONA,
STATE TAX COMMISSION OF ARIZONA, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS

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I.

INTRODUCTION

At the outset, the appellee, State of Arizona, State Tax Commission of Arizona, (hereinafter "Arizona") wishes to point out several portions of appellant's Jurisdictional Statement with which it disagrees. In this regard, Central Machinery Company

(hereinafter "CMC") characterizes its "Question Presented" as being whether or not the State of Arizona has jurisdiction to tax "...the sale of farm machinery by an Arizona corporation to an Indian tribe ...". In order to avoid any misinterpretation of this language, Arizona wishes to point out that the taxable event under the transaction privilege tax code provisions here in question (i.e., A.R.S. §§ 42-1309, 42-1312, 42-1361) is not the actual sale of tangible personal property. Rather, the taxable event is the exercise of the privilege of engaging in business within the State of Arizona, the gross receipts from the sale transaction constituting only the measure of the magnitude of the business activity. Tower Plaza Investments, Ltd. v. DeWitt, 109 Ariz. 248, 508 P.2d 324 (1973), appeal dismissed, 414 U.S. 1118 (1974).

Similarly, Arizona disagrees with

CMC's characterization in its "Statement of the Case" of the transaction at issue being a "...sale of farm machinery from CMC to Gila River Farms...." Again, the Arizona transaction privilege tax is not imposed upon sales transactions themselves, but rather is imposed upon the privilege of engaging in business within the State of Arizona. Accordingly, the Arizona transaction privilege tax is not to be equated with a "sales" tax insofar as such comparison attempts to establish that the actual taxable event is the sale transaction itself rather than the exercise of the privilege of engaging in business. This distinction is germane herein with respect to any conclusions to be drawn relating to the person or entity bearing the legal incidence of the tax.

The Supreme Court of Arizona has consistently held, in interpreting the operation of the transaction privilege tax,

that the legal incidence of the tax falls upon the person or entity engaged in business within Arizona and does not fall upon such entity's customers. Tower Plaza Investments, Ltd. v. DeWitt; supra, Arizona State Tax Commission v. Garrett Corporation, 79 Ariz. 389, 291 P.2d 208 (1955). This determination should be deemed conclusive. American Oil Co. v. Neill, 380 U.S. 451 (1965). Moreover, there is no provision of Arizona law which mandates that either the legal incidence or the economic burden of the tax be "shifted" or "passed on" from the business entity to its customers, any "shifting" of the economic burden occurring solely by grace of statutory silence and contractual negotiation between the business and the customer. Arizona State Tax Commission v. Garrett Corporation, supra.

Finally, Arizona would point out that CMC's Statement of the Case includes several references to factual matters which

were contained in a stipulated statement of facts filed at the trial court level. Among the facts asserted by CMC in its statement of the case is that Gila River Farms raises crops on tribal trust land within the Gila River Indian Reservation in Arizona. The appellee has no way of confirming this assertion since it was not included in the original statement of facts filed in the court below. Furthermore, CMC's Statement of the Case includes references to the history and establishment of the Gila River Indian Reservation which were not a part of the stipulated facts in the court below. Such facts were neither raised nor urged in the court below. While these matters may raise mixed questions of fact and law, and thus properly before this Court, it is simply the appellee's objective to point out that the Jurisdictional Statement constitutes the first document in this controversy wherein such

matters have been set forth.

In this regard, Arizona would further point out that several facts which were included in the stipulated statement of facts filed in the lower court have been omitted from those facts to which CMC refers in its Statement of the Case, including the following:

1. Initial delivery of the tractors was made from John Deere Company to CMC's plant in Casa Grande early in 1974 where the tractors were made "dealer-ready" (i.e., adjusted, lubricated, etc.) by CMC;

2. Thereafter, the tractors were delivered to Gila River Farms at Sacaton, Arizona on the Gila River Indian Reservation;

3. CMC, as a corporation engaged in business for profit, "passed on" the economic burden of both the transaction privilege tax liability related to the transaction in question as well as the economic burdens of

its other taxes and costs, such latter burdens being included as undifferentiated cost components in the purchase price.

II.

THE FEDERAL QUESTION PURPORTEDLY RAISED IS NOT SUBSTANTIAL.

A. The decision below does not conflict with the decisions of this Court.

The thrust of CMC's argument is that this Court's decision in Warren Trading Post Company v. Arizona Tax Commission, 380 U.S. 685 (1965) (hereinafter "Warren") controls and that the Arizona Supreme Court's decision herein conflicts with the rationale of that case. For the following reasons, Arizona disagrees.

To begin with, the Warren Trading Post Company was a federally-licensed Indian trader in presumptive compliance with the full spectrum of federal laws and regulations governing the business of Indian trading on Indian reservations. In

addition, as footnote 1 in Warren, (380 U.S. at 686) and the breifs therein reveal, the licensed Indian trader made no challenge to the right of Arizona to impose the transaction privilege tax directly upon it with respect to its sales to non-Indians on the reservation. Moreover, although the Warren Trading Post Company argued both that the tax in question was preempted by federal law as well as that it constituted an interference with Indian Commerce, (see, 14 L.Ed.2d at 812-313), this Court based its ruling upon the preemption issue and did not reach the Commerce Clause question. (See, 380 U.S. at 686.)

Accordingly, it is the position of Arizona herein that the holding articulated in Warren is bottomed upon the fact that because the Warren Trading Post Company was engaged in the business of Indian trading upon an Indian reservation and was therefore subject to and in compliance

with the full range of federal laws and regulations established by Congress to govern such reservation mercantile Indian trade business, the State taxes in question were preempted. Indeed, this Court specifically stated that the apparently all-inclusive regulations and statutes authorizing them established that Congress had "...taken the business of Indian trading on reservations so fully in hand that no room remains for State laws imposing additional burdens upon traders." (Emphasis added.) 380 U.S. at 390. In reaching this conclusion, this Court pointed out (380 U.S. at 690, n. 14) that the federal statutes and regulations applied only to activities on reservations, citing Taylor v. United States, 44 F.2d 531 (9th Cir. (1930), cert. denied, 283 U.S. 820 (1931) and an opinion of the Solicitor's Office of the Department of the Interior, 57 I.D. 124 at 125.

This Court also relied upon another Solicitor's Opinion, 58 I.D. 562 which, as did the prior Solicitor's Opinion, interpreted the federal statutes to bar states from taxing "...federally-licensed Indian traders on their sales to reservation Indians on a reservation." (380 U.S. at 690).

It is Arizona's position herein that an examination of this Court's holding above-quoted along with the authorities upon which the holding was based establishes that the area being preempted is that of the business of Indian trading on an Indian reservation. If an entity is not engaged in the business of Indian trading upon an Indian reservation or if the taxable activity which purportedly triggers the application of the state tax does not occur upon an Indian reservation, it is Arizona's position that no preemption occurs and that state laws of general

application, including tax laws, remain in effect with respect to a person or entity engaged in business within the state.

It at once becomes apparent that CMC does not "fit the mold" created under Warren. It is the business of Indian trading on an Indian reservation that has been preempted, not sales to reservation Indians by off-reservation retailers not engaged in the business of Indian trading. Indeed, Solicitor's Opinion 57 I.D. 124, supra, specifically opines, 57 I.D. at 126, that where traders are not located on Indian reservations they are responsible for the state taxes in question and are subject to state licensure whether or not they are Indians and whether or not they deal with Indians, save with regard to special types of Indian purchases purportedly made as instrumentalities of the federal government used to improve the economic conditions of the Indians.

Moreover, Solicitor's Opinion 58-562, supra, further narrows the limited exception set forth in 57 I.D. 124 at 126, supra. Specifically, after examining this Court's decisions in, among others, Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943), Penn Dairies v. Milk Control Commission of Pennsylvania, 318 U.S. 261 (1943) and State of Alabama v. King & Boozer, 314 U.S. 1 (1941), Solicitor's Opinion 58 I.D. 562, 567 held, inter alia:

> "That part of the opinion of May 8, 1940 [i.e., 57 I.D. 124, supra] which held that purchases made by an Indian or by Government agents for an Indian with restricted funds outside of an Indian reservation were exempt from the payment of State sales taxes is overruled, and the superintendents should be instructed that merchandise obtained on purchase orders issued to merchants doing business outside of the reservation and paid for with restricted funds is subject to state sales taxes unless Congress has provided that the funds used are tax exempt." (Emphasis added.)

In the instant case, it is manifestly apparent that CMC is not located on the Gila River Indian Reservation, but is a merchant doing business outside of the Reservation rather than upon the Reservation as a federally-licensed Indian trader. CMC's assertion (Jurisdictional Statement, p. 6) that the Bureau of Indian Affairs Superintendent "...licensed this single transaction rather than authorizing CMC to conduct regular business..." is somewhat inaccurate. The only thing that the Superintendent did, as noted in the stipulation of facts, was approve the purchase order for the tractors. The record herein is singularly barren of any indication that a federal Indian trader's license under 25 U.S.C. §§ 261, et seq. or an itinerant peddler's license under 25 C.F.R. § 251.9(b) was either applied for or issued or, in fact, that CMC was even entitled to acquire one.

Again, the taxable event under the Arizona transaction privilege tax code is the exercise of the privilege of engaging in business and not the sales transaction itself. The fact that the tractors were delivered on the Indian reservation does not alter the fact that the purchase order covering the transaction was issued not to a federally-licensed Indian trader doing business within the exterior boundaries of the reservation, but rather, was issued to a non-Indian Arizona corporation engaged in the business of selling tangible personal property at retail within the geographic and jurisdictional boundaries of the State of Arizona within the City of Casa Grande, Arizona, a site not located within the exterior boundaries of any Indian reservation at all.

Under these circumstances, the distinction between Warren and the instant matter is sharpened. Insofar as

CMC is concerned, both the taxable event (engaging in business) as well as the sale transaction by which the taxable event was measured occurred within the political and geographic boundaries of the State of Arizona. Surplus Trading Company v. Cook, 281 U.S. 647 (1930). Since the only taxable event with which the Arizona transaction privilege tax is concerned herein occurred both within the State of Arizona and beyond the boundaries of any Indian reservation, the application of the tax to CMC, as a merchant not located upon any Indian reservation and not licensed as either a federal Indian trader or itinerant peddler, is not only not in conflict with the rationale of Warren, but rather is in conformity with subsequent decisions of this Court in this regard. See, e.g., Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 480-483 (1976); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 153

(1973); cf. Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962).

It would be anomalous indeed to hold that a retailer such as CMC, who maintians no place of business on an Indian reservation (unlike Warren Trading Post Company), who has obtained neither an itinerant peddler's license nor a federal Indian trader's license (unlike Warren Trading Post Company), who maintains a permanent place of business within Arizona off of any reservation (unlike Warren Trading Post Company), who is entitled to and enjoys the full range of state police, fire, sanitation and similar services (unlike Warren Trading Post Company) and who is unquestionably engaged in the business of selling tangible personal property within the jurisdiction of Arizona beyond the exterior boundaries of any Indian reservation (unlike Warren Trading Post Company) should be entitled to the same

tax exemption benefits available to a reservation mercantile trade operation in full compliance with the preemptive federal statutes and regulations (like Warren Trading Post Company).

In this regard, the decision in the Moe case, supra, strongly supports the dismissal of the instant appeal. As the Supreme Court of Arizona noted in its opinion, 589 P.2d 426 at 428, the factors controlling the imposition of a state tax have by this Court been set forth in the Moe decision, supra. In that case, this Court held, inter alia, that where the legal incidence of a state tax fell upon a non-Indian purchasing cigarettes from an Indian vendor upon an Indian reservation, the fact that certain detrimental economic burdens associated with the collection of such tax would be borne by a reservation Indian were not impermissible in spite of the fact that such detrimental

economic burdens were the result of a tax "precollection" provision mandated by Montana state law. See, 425 U.S. at 481-483. In so holding, this Court pointed out that its decision in Warren involved the Arizona transaction privilege tax as applied to business activities occurring completely within the exterior boundaries of the Indian reservation in question.

The Arizona Supreme Court further relied upon this Court's language in the Moe case, supra, 425 U.S. at 483, to the effect that the economic burdens associated with the precollection of the Montana tax by the Indian vendor and borne by the Indian vendor did not frustrate tribal self-government under Williams v. Lee, 358 U.S. 217, 219-220 (1959) or run afoul of any congressional enactment dealing with the affairs of reservation Indians under United States v. McGowan, 302 U.S. 535, 539 (1938).

As stated by this Court in United States v. McGowan, supra, 302 U.S. at 539, and reiterated by this Court in the Moe decision, supra, 425 U.S. at 483:

> "Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments."

If the State of Arizona were attempting herein to tax the actual sale transaction which transpired upon the Gila River Indian Reservation, CMC's argument would have more appeal. However, as previously noted, Arizona seeks to tax only the exercise by CMC within the State of Arizona at Casa Grande, Arizona of the privilege of engaging in business.

The dispute is thus brought full circle back to the initial position urged by Arizona herein, that is, that Warren establishes that the preeempted area is that of the business of Indian trading on an Indian reservation and not the total area of

Indian Commerce between reservation Indians or reservation Indian entities and merchants other than licensed Indian traders engaged in business beyond the boundaries of any Indian reservation.

In this regard, CMC's argument (Jurisdictional Statement, p. 5) that the Arizona Supreme Court ruling was that the federal statutes governing trade with Indians did not apply to it is somewhat inaccurate. The Arizona Supreme Court held that since CMC was not a licensed Indian trader within the purview of Warren, the tax herein was not preempted, because CMC was not an Indian trader. Clearly, although it was not urged in the lower court, CMC , as any other person not possessed of a federal Indian trader's license or an itinerant peddler's license, would be subject to the sanctions of forfeiture of goods and fine for introducing goods for sale into the reservation with-

out required licenses and without having complied with the detailed regulations prescribing in the most minute fashion who shall be licensed, how the trade shall be conducted, what prices shall be charged, etc., established under federal law.

Thus, CMC's reliance upon Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 660 (1976) is misplaced. It is one thing to argue that an administrative interpretation of a statute, while not conclusive, is entitled to great respect, the point made in the Hollowbreast case, supra. It is quite another thing, however, to argue that, in the face of apparently all-inclusive mandatory statutes and regulations governing the business of Indian trading on reservations, the requirements of such provisions may go virtually ignored while the benefits otherwise flowing from compliance therewith may be enjoyed. Quite simply, CMC, not being engaged in the business

of Indian trading on an Indian reservation within the meaning of Warren, is not entitled to the asserted exemption from taxation herein on the purported basis that the entire area of commerce with Indians has been preempted.

Indeed, the fact that CMC may not have had a federal Indian trader's license or an itinerant peddler's permit may be nothing more than a manifestation of its nonentitlement thereto. Such an interpretation is not only reasonable, but is consistent with the holding in Solicitor's Opinion 58 I.D. 562 to the effect that the superintendents of the various reservation agencies overseeing purchases of goods by reservation Indians were to be instructed that merchandise obtained on purchase orders issued to merchants doing business outside of the reservation and paid for even with restricted funds were subject to state sales taxes unless Congress had

specifically provided that the funds used were tax-exempt. The record herein is devoid of any indication that Congress specified that the funds used to purchase the eleven tractors in question were to be tax-exempt. On the contrary, the fact that the Superintendent of the Pima Agency approved the purchase order, which purchase order included the economic burden of the transaction privilege tax imposed upon CMC, further buttresses the conclusion that CMC was not and is not engaged in the business of Indian trading within the exterior boundaries of any Indian reservation and that the transaction was properly included in the measure of CMC's business activity.

Accordingly, Central Machinery Company's reliance upon United States v. Rickert, 188 U.S. 432 (1903), Mescalero Apache Tribe v. Jones, supra, and McClanahan v. Arizona Tax Commission, 411 U.S. 164

(1973) (hereinafter "McClanahan") is inapposite. Each of the aforesaid cases involved fact situations distinguishable from the present one in that the state taxes in question were being imposed directly upon reservation Indians or reservation Indian property. Such an attempt to impose the direct legal incidence of a state tax upon such a person or property is impermissible under those decisions, but the circumstance is without relevance to the present dispute. The fact of the matter is that, in situations not involving preempted areas such as that of engaging in the business of Indian trading on an Indian reservation, the fact that the economic burdens of state taxes may, in some form or another, be borne by reservation Indians or Indian entities does not, for that reason, invalidate the tax. Moe v. Confederated Salish and Kootenai Tribes, supra; Fort Mojave Tribe v. County of San

Bernardino, 543 F.2d 1253 (9th Cir. 1976), cert. denied 430 U.S. 983 (1977); Kahn v. Arizona State Tax Commission, 16 Ariz. App. 17, 490 P.2d 846 (1971), appeal dismissed, 411 U.S. 941 (1973);[1] cf. Tonasket v. State of Washington, 84 Wash.2d 164, 525 P.2d 744 (1974), appeal dismissed 420 U.S. 915 (1975); Makah Indian Tribe v. Tax Commission of Washington, 72 Wash.2d 613, 434 P.2d 580, appeal dismissed 393 U.S. 8 (1968).

CMC's reliance upon and analysis of McClanahan misapplies the holding in that case and attempts to expand the reach of Warren in derrogation of this Court's ruling in the Moe case, supra. The fact that this Court cited its prior decision

1. The appeal was dismissed for want of a substantial federal question one month after the decision in McClanahan v. Arizona Tax Commission, supra. In view of the dissent to the dismissal (authored by Justice Douglas and joined in by Justice Brennan), Arizona would submit herein that the dismissal should be treated as a binding adjudication on the merits entitled to precedential weight. State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, ___ U.S. ___, 99 S.Ct. 740, 749-750 n. 20 (1979); Hicks v. Miranda, 422 U.S. 332, 343-345 (1975).

in Warren in reaching its decision in McClanahan does not permit CMC to argue, therefore, that the rationale of Warren should be applied to void the imposition of a tax upon an off-reservation non-Indian retail merchant who himself -- rather than his customers (whether they be Indian or non-Indian) -- bears the legal incidence of the state tax in question.

CMC's assertion (Jurisdictional Statement, p. 7) that it is obvious that the tax herein is more burdensome to the Gila River Tribes than was the tax at issue in McClanahan to the Navajo Tribe, is not only unsupported by the record, it is inaccurate as well when one recalls that Rosalyn McClanahan brought her action not only in her own behalf but upon behalf of all those similarly situated, the traditional requirement of a class action.

The fact remains that in the present case, beyond the circumstance that the

legal incidence of the tax falls upon a non-Indian merchant doing business not within the exterior boundaries of an Indian reservation rather than upon an Indian living upon and earning all of his or her income from sources within the Indian reservation, the Gila River Farms, as vendee, bore nothing more than a collection of various categories of costs passed on to it by CMC as part of the overall contract price. In addition to the contractually "passed on" economic burden of CMC's transaction privilege tax, Gila River Farms also bore and paid for, without protest and with the approval of the Superintendent of the Pima Agency, the economic burdens of CMC's other taxes and costs which were included as undifferentiated components within the purchase price of the tractors. This circumstance clearly distinguishes the factual framework of the present case from the facts in the McClanahan,

Rickert and Mescalero Apache Tribe cases, supra.

In short, the federal question herein which CMC contends is substantial and important is, in fact, not present. The holdings in the Warren Trading Post and Moe decisions, supra, as well as the Opinions of the Solicitor's Office cited and relied upon in Warren clearly establish that CMC is not engaged in the business of Indian trading upon an Indian reservation, and, accordingly, should not be treated as a "licensed Indian trader" entitled to the benefits, but not subject to the responsibilities, associated therewith.

B. The decision below does not conflict with United States ex rel. Hornell v. One 1976 Chevrolet Station Wagon, 585 F.2d 978 (10th Cir. 1978).

CMC also argues that the Arizona Supreme Court's opinion herein conflicts with the decision in United States ex rel.

Hornell v. One 1976 Chevrolet Station Wagon, 585 F.2d 978 (10th Cir. 1978). The State of Arizona disagrees.

The Hornell case, supra, held that the provisions of 25 U.S.C. § 264 applied to a New Mexico auto dealership ("Navajo Motors") to authorize a $500 fine against it for selling a car to a Navajo Indian husband and wife on the Navajo Reservation, but without a federal Indian trader's license. Although the United States and the husband and wife also sought forfeiture of the car, as authorized by 25 U.S.C. § 264, the court rejected this part of the claim.

There is nothing inconsistent between the result in the Hornell case, supra, and the Arizona Supreme Court's decision herein. 25 U.S.C. § 264 prohibits any person other than an Indian of the whole blood (unless dealing with the Chotaws, Cherokees, Chickasaws, Creeks or Seminoles) to trade within or introduce goods into an Indian

reservation without the federal trader's license authorized under 25 U.S.C. § 261. There is nothing in the Arizona Supreme Court's opinion herein that would prohibit the initiation of a qui tam or forfeiture action against CMC: CMC, as did Navajo Motors, introduced goods into an Indian reservation without the required federal trader's license, an act that "...falls squarely within the scope of commercial activities proscribed by the statute." See 585 F.2d at 980.

This does not mean, however, that Navajo Motors was engaged in the business of Indian trading on an Indian reservation as was the Warren Trading Post Company. All that it means is that Navajo Motors violated the federal law by selling the car without the required license, a result that would obtain with respect to anyone else who did the same thing. The obvious purpose of 25 U.S.C. § 264 is to discourage

unlicensed persons from selling goods to reservation Indians except in strict conformity with federal laws and regulations governing the prices, quality, etc. of the goods. Indeed, only Indians of the whole blood are completely exempted from the requirement.

Thus, the Arizona Supreme Court opinion is not at variance with the Hornell case, supra, because it deals with an issue not addressed in the reported decision, viz, whether or not a retail merchant not located on an Indian reservation is entitled to tax exemptions otherwise available to a licensed Indian trader in the business of Indian trading from a fixed place of business on a reservation. In point of fact, in view of the penalty and stringent forfeiture provisions of 25 U.S.C. § 264, it is somewhat ironic that CMC, rather than CMC's Indian customer, Gila River Farms, would seek support for its position in the Hornell case, supra.

III.

CONCLUSION

For the foregoing reasons, the appeal herein should be dismissed.

Respectfully submitted this 29th day of May, 1979.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 1979, three copies of the MOTION TO DISMISS were mailed postage prepaid to:

RICHARD B. COLLINS
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I further certify that all parties required to be served have been served.

ROBERT K. CORBIN
Attorney General

IAN A. MACPHERSON
Assistant Attorney General
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SUBSCRIBED AND SWORN to before me this 29th day of May, 1979.

Notary Public

My commission expires:

1-17-81